

ENTERED

March 25, 2022

Nathan Ochsner, Clerk

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

BRAZOS ELECTRIC POWER
COOPERATIVE, INC.,

Debtor.¹

BRAZOS ELECTRIC POWER
COOPERATIVE, INC., *et al.*,

Plaintiff / Plaintiff-Intervenors,

v.

ELECTRIC RELIABILITY COUNCIL OF
TEXAS, INC., *et al.*,

Defendant / Defendant-Intervenors.

Chapter 11

Case No. 21-30725 (DRJ)

Adv. Proc. No. 21-03863 (DRJ)

**MEDIATION ORDER APPOINTING
JUDGE MARVIN ISGUR AS MEDIATOR**

WHEREAS, Plaintiff Brazos Electric Power Cooperative, Inc. (“Brazos” or the “Debtor”) and the Plaintiff-Intervenors the Official Committee of Unsecured Creditors (the “Committee”), Mid-South Electric Cooperative Association (“Mid-South”), Denton County Electric Cooperative, Inc., d/b/a CoServ Electric (“CoServ”), United Electric Cooperative Services, Inc., d/b/a United Cooperative Services (“United”), Tri-County Electric Cooperative, Inc. (“Tri-County”), and the Ad Hoc Member Group² (collectively, with Mid-South, CoServ, United, and Tri-County, the

¹ The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number is: Brazos Electric Power Cooperative, Inc. (4729). Additional information regarding this case may be obtained on the website of the Debtor’s claims and noticing agent at <http://cases.stretto.com/Brazos>. The Debtor’s address is 7616 Bagby Avenue, Waco, TX 76712.

² The eight members of the Ad Hoc Member Group are: (a) Bartlett Electric Cooperative, Inc.; (b) Comanche County Electric Cooperative Association; (c) Cooke County Electric Cooperative Association, Inc. d/b/a PenTex Energy; (d) Hamilton County Electric Cooperative Association; (e) Heart of Texas Electric Cooperative, Inc.; (f) J-A-C Electric Cooperative, Inc.; (g) Navasota Valley Electric Cooperative, Inc.; and (h) Wise Electric Cooperative, Inc.

“Intervening Co-Op Members,” and together with the Committee, the “Plaintiff Intervenors,” and together with Brazos, the “Plaintiffs”), on the one hand, and Defendant Electric Reliability Council of Texas, Inc. (“ERCOT”) and the Defendant-Intervenors Calpine Corporation, on behalf of itself and each of its affiliates, including but not limited to Calpine Energy Services, L.P., Calpine Energy Solutions, LLC, and Cavallo Energy Texas, LLC (collectively, “Calpine”), NRG Energy, Inc., on behalf of itself and each of its affiliates, including but not limited to Direct Energy LP, NRG Cedar Bayou Development Company, LLC, NRG South Texas LP, NRG Texas Power LLC, NRG Power Marketing LLC, and Cirro Group, Inc. (collectively, “NRG”), NextEra Energy Marketing, LLC (“NextEra”), Talen Energy Supply, LLC, on behalf of itself and each of its affiliates, including but not limited to Talen Energy Marketing, LLC (collectively “Talen”), ENGIE Energy Marketing NA, Inc., on behalf of itself and each of its affiliates, including but not limited to Anson Solar Center LLC, Live Oak Wind Project LLC, Engie Long Draw Solar LLC, Las Lomas Wind Project LLC, Jumbo Hill Wind Project, LLC, Prairie Hill Wind Project, LLC, Solaire Holman 1 LLC, Seymour Hills Wind Project LLC and Engie Resources LLC (collectively, “ENGIE”), Tenaska Power Services Co. (“Tenaska”), Golden Spread Electric Cooperative, Inc. (“Golden Spread”), and South Texas Electric Cooperative, Inc. (“STEC,” and collectively with Calpine, NRG, NextEra, Talen, ENGIE, Tenaska, and Golden Spread, the “Defendant Intervenors,” and together with ERCOT, the “Defendants,” and together with the Plaintiffs, the “Parties” and each individually, a “Party”), on the other hand, agree that mediation may be an efficient and effective mechanism to consensually resolve the issues at hand;

WHEREAS the Public Utility Commission of Texas (the “PUCT”) also agrees to participate in mediation without waiving or intending to waive sovereign immunity and on the condition that no Party will cite to the PUCT’s participation in mediation as a basis for any

argument that the State of Texas or the PUCT does not have sovereign immunity or that it has been waived.

WHEREAS, on March 1, 2021, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and the Debtor has continued in possession of its property and has continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, on June 14, 2021, ERCOT filed a proof of claim in the above-captioned chapter 11 case (as amended, the “ERCOT Claim”);

WHEREAS, on August 18, 2021, the Debtor filed its *Complaint Objecting to ERCOT’s Proof of Claim and Other Relief* [Adv. Dkt. No. 1] (as amended, the “Debtor’s Complaint”)³ objecting to the allowance and classification of the ERCOT Claim, thereby commencing the above-captioned adversary proceeding (the “Adversary Proceeding”);

WHEREAS, the Committee has intervened in the Adversary Proceeding by stipulation [Adv. Dkt. No. 20];

WHEREAS, on October 18, 2021, the Court granted the Intervening Co-Op Members’ and the Defendant Intervenors’ respective motions to intervene in this Adversary Proceeding;

WHEREAS, on February 22, 2022, the Parties commenced the trial on the Debtor’s Complaint (the “Trial”) before Chief Judge David R. Jones.

Upon the request and agreement of the Parties, it is **HEREBY ORDERED** that:

1. The Parties shall participate in a mediation (“Mediation”) of all issues in this Adversary Proceeding before the Honorable Marvin Isgur, United States Bankruptcy Judge

³ See Adv. Dkt. No. 173.

(“Judge Isgur”), and the Mediation may include such other issues as deemed appropriate by Judge Isgur in order to attempt to resolve any issues between the Parties related to the ERCOT Claim.

2. The Mediation shall terminate on the earlier of (a) the date on which Judge Isgur determines that the Mediation has terminated (and advises the Parties of such determination) or (b) April 25, 2022, unless such date is extended by (x) agreement of each of the Parties or (y) an order of the Court.

3. During the Mediation, the Trial is abated. The Parties agree to file a joint motion requesting that the Fifth Circuit extend the briefing deadlines such that Appellant’s brief will be due 30 days after the termination of the mediation.

4. Each Party at the Mediation shall participate to the extent practicable with a principal or other representative (or multiple principals or other representatives as needed); *provided, however,* that in the case of the Committee, client representatives of the Committee shall not be required to attend the entirety of the Mediation but shall be reasonably available should they need to be consulted by counsel to the Committee or Judge Isgur. Any such principal or representative of a Party shall either have reasonable settlement authority or have sufficient stature in his or her organization to be able to recommend to any ultimate person, board or commission that a proposal or settlement be approved.

5. Parties’ financial advisors may participate in the Mediation, as necessary.

6. ERCOT market participants who are not Parties but who have a short-pay claim against ERCOT for any real-time energy market interval between 22:15 on February 15, 2021 and 9:00 on February 19, 2021 may participate in the Mediation if such market participant agrees to be bound by the terms of this Order and such other and further conditions required by Judge Isgur.

For the avoidance of doubt, the provisions of Paragraph 12 apply to such non-party market participants to the Mediation.

7. The Parties may request that Judge Isgur mediate other issues in connection with, or related to, this Adversary Proceeding and he is authorized to mediate such issues if, and at such time as, he determines appropriate.

8. Judge Isgur has absolute discretion as to the timing, means and methods of the Mediation; *provided, however,* that the Mediation shall be non-binding and that the Mediation may be conducted either in person or via video and teleconference.

9. Judge Isgur will mediate this Adversary Proceeding in his capacity as a United States Bankruptcy Judge and will have full, unqualified judicial immunity in his role as a mediator.

10. Judge Isgur may not be called as a witness in this Adversary Proceeding or any other proceeding concerning his role herein as the mediator.

11. Each Party shall bear its own costs and expenses incurred in connection with the Mediation, including attorney's fees.

12. The Parties and their respective counsel shall participate in the Mediation in good faith.

13. All communications made by and all submissions prepared by a Party in connection with the Mediation, including but not limited to discussions or communications with or in the presence of Judge Isgur and all settlement proposals, counterproposals, and offers of compromise made during the Mediation shall (a) be subject to protection under Rule 408 of the Federal Rules of Evidence and any other equivalent or comparable federal and state laws and rules, (b) not be submitted or offered as evidence in any court, tribunal, or other proceeding, including, without limitation, in any pleading or other submission to any court, (c) be subject to any applicable

confidentiality agreements entered into between a Party and the Debtor governing the disclosure of confidential information (including, if applicable, any cleansing provisions relating to material non-public information), (d) be protected from disclosure under Texas Public Information Act, Texas Government Code Chapter 552, and (e) not constitute material nonpublic information. For the avoidance of doubt, any communications and submissions in connection with the Mediation may be designated “for advisors’ eyes only” (or other similar designation), without prejudice to the rights of any Party to object to or challenge such designation.

14. Each Party may share with Judge Isgur any information it has received pursuant to a protective order without regard to the provisions thereof; *provided, however,* the sharing with Judge Isgur of any information designated as Confidential Material or Highly Confidential Material shall not waive the confidentiality designation of such information and Judge Isgur shall not disclose such information to anyone else.

15. As soon as practicable after the conclusion of the Mediation, Judge Isgur shall file a mediation statement in the Adversary Proceeding which shall identify who participated in the Mediation and state whether the proceeding was settled or an impasse was declared by Judge Isgur.

16. The Court retains jurisdiction in connection with this Order and all matters related thereto.

Signed: March 25, 2022.



DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

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